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IN THE
COURT OF APPEALS OF INDIANA

JERRY LYNN McCLURE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0609-CR-818
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0601-FA-1

August 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Jerry Lynn McClure appeals his sentence for robbery resulting in serious bodily injury as a class A felony[1] and being an habitual offender.[2] McClure raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing McClure; and

II. Whether McClure's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On January 17, 2006, McClure went to a store in Lafayette armed with a knife with the intent to rob someone. McClure selected Phyllis Washington as his victim because she was older and he believed she would be easier to rob than a man or a younger woman. McClure confronted Washington, stabbed Washington in an attempt to get her purse, and took her purse. Washington suffered serious bodily injury as a result of the attack.

The State charged McClure with attempted murder as a class A felony,[3] robbery resulting in serious bodily injury as a class A felony, aggravated battery as a class B felony,[4] battery resulting in serious bodily injury as a class C felony,[5] theft as a class D

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[1] Ind. Code § 35-42-5-1 (2004).

[2] Ind. Code § 35-50-2-8 (Supp. 2005).

[3] Ind. Code §§ 35-41-5-1 (2004); 35-42-1-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 16 (eff. July 1, 2006), Pub. L. No. 173-2006, § 51 (eff. July 1, 2006)).

[4] Ind. Code § 35-42-2-1.5 (2004).

felony,[6] and being an habitual offender. The trial court scheduled a jury trial for August 1, 2006. On July 26, 2006, McClure pleaded guilty to robbery resulting in serious bodily injury as a class A felony and being an habitual offender, and the State dismissed the remaining charges and agreed not to seek probation revocation in any pending case.

The trial court found the fact that McClure had pleaded guilty as a mitigator. The trial court also noted that "I don't doubt that you are sincerely remorseful . . . And I do appreciate the fact that you're [sic] particular disabilities, mental and developmental, make it difficult for you to control yourself." Sentencing Transcript at 27. The trial court found the following aggravators: (1) McClure's history of criminal or delinquent activity; (2) prior attempts at rehabilitation had failed; (3) McClure was on probation at the time of the instant offense; and (4) the age of the victim. The trial court concluded that the aggravating factors "far outweigh[ed] the mitigating factors." Id. The trial court sentenced McClure to forty-five years for the robbery as a class A felony enhanced by thirty years for being an habitual offender for a total sentence of seventy-five years.

I.

The first issue is whether the trial court abused its discretion in sentencing McClure. McClure argues that: (A) the trial court failed to find significant mitigators; and (B) the trial court improperly found several aggravators. We note that McClure's

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[5] Ind. Code § 35-42-2-1 (Supp. 2005).

[6] Ind. Code § 35-43-4-2 (2004).

offense was committed after the April 25, 2005, revisions of the sentencing scheme.[7] In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it fails "to enter a sentencing statement at all," enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons," enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

A. Mitigators

[7] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-5 (Supp. 2005).

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001), reh'g denied. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). McClure argues that the trial court failed to consider his mental retardation and failed to give greater weight to his guilty plea.[8]

1. Mental Illness

[8] McClure also mentions that "his substance abuse problem, and his role as caretaker to his mother--who will suffer great hardship in his absence--also requires [sic] a lesser sentence." Appellant's Brief at 18. McClure's failure to develop these arguments or support them with citations to authority waives these issues. See, e.g., Davenport v. State, 734 N.E.2d 622, 623-624 (Ind. Ct. App. 2000), trans. denied.

McClure argues that the trial court erred by failing to consider his mental illness as a mitigating factor. "A trial court is not required to consider as mitigating circumstances allegations of appellant's substance abuse or mental illness." James v. State, 643 N.E.2d 321, 323 (Ind. 1994). The Indiana Supreme Court has outlined several considerations that bear on the weight, if any, that should be given to mental illness in sentencing. These factors include: (1) the extent of the defendant's inability to control his behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. Weeks v. State, 697 N.E.2d 28, 31 (Ind. 1998). Where a defendant's mental illness is less severe and the defendant appears to have more control over his thoughts and actions, or where the nexus between defendant's mental illness and the commission of the crime is less clear, the trial court may determine on the facts of a particular case that the mental illness warrants relatively little or no weight as a mitigating factor. Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997), reh'g denied.

The trial court here considered McClure's proposed mental disorder mitigator but did not find it to carry mitigating weight. Moreover, McClure has not shown that there was a nexus between his mental condition and the commission of the crime. Rather, McClure concedes that the "crime in this case was not directly linked to his mental retardation." Appellant's Brief at 5. Accordingly, the trial court did not err by failing to find McClure's mental condition as a significant mitigating factor. See, e.g., Corralez v. State, 815 N.E.2d 1023, 1026 (Ind. Ct. App. 2004) (holding that the trial court did not err

in rejecting the defendant's mental history as a mitigator where the defendant offered no indication that his mental health was responsible for his decision making process on the day of the crime).

2. Guilty Plea

McClure argues that the trial court should have assigned his guilty plea greater mitigating weight. McClure asks us to review the weight given to a mitigating factor for abuse of discretion, which we cannot do. See Anglemyer, 868 N.E.2d at 491 (holding that the relative weight or value assignable to aggravating and mitigating factors properly found is not subject to review for abuse of discretion).

B. Aggravators

The trial court found the following aggravators: (1) McClure's history of criminal or delinquent activity; (2) prior attempts at rehabilitation had failed; (3) McClure was on probation at the time of the instant offense; and (4) the age of the victim. McClure only challenges the weight of his criminal history as an aggravator.

McClure concedes that he has a criminal history but argues that the convictions are significant only in number and do not relate in both similarity and gravity. McClure argues that his criminal history "was given excessive weight as an aggravating circumstance." Appellant's Brief at 20. McClure asks us to review the weight given to an aggravating factor for abuse of discretion, which we cannot do. See Anglemyer, 868 N.E.2d at 491 (holding that the relative weight or value assignable to aggravating and mitigating factors properly found is not subject to review for abuse of discretion).

II.

The next issue is whether McClure's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that McClure went to a store armed with a knife with the intent to rob someone. McClure confronted Washington, stabbed Washington in an attempt to get her purse, and took her purse. Washington suffered serious bodily injury as a result of the attack.

Our review of the character of the offender reveals that McClure has an extensive criminal history. McClure selected Washington because she was older and he believed she would be easier to rob than a man or a younger woman. McClure expressed remorse at the sentencing hearing. The extent to which McClure is mentally retarded is unclear from the record. Dr. Jeffrey Wendt performed a "Criminal Responsibility/Insanity assessment," reviewed available treatment records, and concluded that McClure met the diagnostic criteria to be considered mentally retarded, but noted that McClure had previously admitted that he was giving wrong answers to a test because of his anger. Presentence Investigation Report at 15. McClure acknowledged that he has substance

abuse problems but has not resolved this longstanding issue. After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Patterson v. State, 846 N.E.2d 723, 731 (Ind. Ct. App. 2006) (holding defendant's sentence of fifty years for robbery resulting in serious bodily injury as a class A felony was not inappropriate).

For the foregoing reasons, we affirm McClure's sentence for robbery resulting in serious bodily injury as a class A felony and being an habitual offender.

Affirmed.

MAY, J. and BAILEY, J. concur